APPENDIX A.

In the United States Circuit Court of Appeals for the Ninth Circuit.

[No. 10,508. May 19, 1944.]

Emanuel Max Cohen and Albert Charles Schnee, appellants, vs. United States of America, appellee.

Upon appeal from the District Court of the United States for the Southern District of California, Central Division.

Before: MATHEWS, STEPHENS and HEALY, Circuit Judges. STEPHENS, Circuit Judge.

Appellants Cohen and Schnee were indicted upon two counts, to-wit, conspiring to defraud the United States and conspiring to ask a bribe. The jury found them guilty on both counts, but the court, on the ground that both counts referred to one conspiracy, sentenced each under the second count only.

Count two of the indictment charges that on or about March 6, 1943, while Cohen was the government appeal agent of the local draft board having jurisdiction under the Selective Service Act of one James L. Sartor, Cohen and Schnee conspired to ask Sartor for money with the intent to influence Cohen's official action in a matter pending before Sartor's draft board, that is, the application of Sartor for a recommendation directed to the United States Army for an extension of his then existing furlough.

Sartor, while a registrant of Local Draft Board No. 199, Los Angeles, California, was duly selected for military service and, on October 14, 1942, was formally and

actually inducted into the United States Army. At the time of his induction he was given a short furlough and thereafter was granted various extensions until March 8, 1943, when he was to report for active duty. The purpose of the furloughs was to enable Sartor to make some disposition of his holdings including a retail liquor store, a bar, and an equity in an apartment house. On February 11, 1943, Sartor requested an additional sixty days' deferment from active duty on the ground that he had not yet been able to settle his financial affairs. He was notified in return that a recommendation of his local selective service board would be necessary to his securing a further extension.

Sartor consulted Cohen, who was the government appeal agent for his draft board. (See note 1 for duties of the appeal agent.) Cohen wrote a letter to the army officials briefly describing Sartor's property holdings and financial position and stating that Sartor requested a deferment on the basis of those facts. A friend advised Sartor that Cohen's letter did not comply with the condition set by the army and that he should speak to Cohen about obtaining a letter of recommendation from the draft board itself. Sartor asked Cohen for such a letter and was told that Cohen, himself, had no authority to make such a recommendation to the army. The evidence is conflicting as to subsequent events.

According to Cohen and Schnee, the secretary of Draft Board No. 199 inquired of the Coordinator of Selective Service whether the draft board had jurisdiction to make a recommendation with respect to Sartor and was answered in the affirmative. (The Selective Service Act and regulations do not support the conclusion reached.) Cohen

told Sartor that the board was to meet on Saturday, March 6, 1943. On Saturday morning Cohen consulted Schnee about an income tax problem entirely foreign to any phase of this case. During the course of the discussion Cohen, in his personal interest, asked Schnee to ascertain the condition of Sartor's liquor store and the price being asked for it. Cohen desired to purchase the business but for various reasons did not wish to publicize the fact. Schnee, using the name of Davis, had several telephone conversations with Sartor concerning the liquor store. Later Saturday morning Cohen saw Sartor, looked over the liquor store, and remarked that he was on his way to the draft board. At its meeting the draft board decided to recommend a thirty-day extension of Sartor's furlough. Immediately thereafter, Cohen again saw Sartor and informed him of the board's recommendation.

According to Sartor, Cohen, who it must be recalled had formerly admitted his own lack of authority to make a recommendation to the army, told Sartor on Saturday morning, March 6, that one Davis would help him secure the desired extension. Davis spoke to him over the telephone and stated that a sixty-day extension would cost $2000.00. Later he saw Cohen again and commented upon Davis' proposition. Cohen dismissed the matter saying it was between Sartor and Davis; Cohen did not mention the action taken by the draft board. Davis telephoned again and when Sartor suggested a price of $500.00, promised to see what he could do. Later in the day Davis informed Sartor by telephone that for $500.00 he could get only a thirty-day extension; Davis instructed him to put the money in an envelope and deliver it to one Popkin at a nearby theatre. Without any question what-

ever Popkin was a disinterested and innocent participant in the affair.

Sartor, accompanied by several others including one Donovan from the police department, handed an envelope containing some money to Popkin. (Schnee insisted that he had asked Sartor to deliver an inventory of his business to Popkin.) After a lengthy discussion Popkin relinquished the Sartor envelope to police officer Donovan. With Donovan listening in, Popkin telephoned Schnee, whose remarks indicated that Davis was in fact Schnee. Agents of the Federal Bureau of Investigation took charge of the matter. Finally, the conspiracy charge herein was filed against Schnee and Cohen.

In the meantime, mistakenly believing Cohen's letter was the draft board recommendation requested, army officials had granted Sartor an additional sixty-day furlough, which was subsequently cancelled before its expiration.

The indictment herein attempts to charge the crime of conspiracy (18 USCA §88) to commit bribery as defined by 18 USCA §207. The latter section decrees that: "Whoever, being an officer of the United States, or a person acting for or on behalf of the United States, in any official capacity, under or by virtue of the authority of any department or office of the Government thereof * * * shall ask, accept, or receive any money * * * with intent to have his decision or action on any question, matter, cause, or proceeding which may at any time be pending, or which may by law be brought before him in his official capacity, or in his place of trust or profit, influenced thereby, shall be fined * * * and imprisoned * * *." The bribery denounced by the section is limited in scope

to the influencing of a person's action on a matter before him in his official capacity. Appellants contend that count two of the indictment fails to state an offense against the United States because Sartor's draft board had no jurisdiction to recommend an extension of furlough for one already inducted in the army, and because such a recommendation was in no way related to Cohen's duties as a government appeal agent. Schnee acted in no official capacity for the United States, and it is only because of Cohen's position that a conspiracy to commit an offense under §207 would be possible.

We express no opinion as to the official status of the local draft board's action in the instant situation. However, even assuming the draft board had jurisdiction, we believe that Cohen had none. The Selective Service Regulations in effect during the period herein involved provide for the appointment of a government appeal agent and outline his duties. They show that his sole function is to aid registrants under the Selective Service Act through the medium of appeals with respect to their classification by the local board.[1] He is in the nature of an attorney

---

[1]Second Edition of the Selective Service Regulations:

"603.71. Appointment and duties. (a) For each local board, a government appeal agent shall be appointed by the President, upon recommendation of the Governor. The duties of the person so designated are: To appeal from any classification by a local board which, in his opinion, should be reviewed by the board of appeal; to care for the interests of ignorant registrants and their dependents with respect to appeals and, where the decision of the local board is against the interests of such persons and where it appears that such persons may not take appeals, due to their own nonculpable ignorance, to inform them of their rights and assist them to enter appeals to the board of appeal; and, after classification, to investigate and report upon matters which are submitted for his investigation by the local board. It shall also be the duty of such government appeal agent, where the interests of justice may require, to suggest to the local board a reopening which in his opinion ought to be investigated. The government appeal agent should expedite the examination of the records of registrants as soon as they have been classified by the local board in order that appeals to the board of appeal, where found necessary, may be filed within the time limit specified in the regulation."

whose services are rendered without charge to registrants in appealing their classifications. He has no function outside the field of draft classification, and within that field his duties are limited to those of counsel on appeal.

In the instant case Sartor had been inducted into the army several months before he requested his draft board to recommend an extension of his furlough. The problem of his classification under the Selective Service Act had long before been finally settled. Under the Act of its Regulations a government appeal agent has no possible official duty in connection with an inductee or with any matter pertaining to a furlough of one already in the army. Therefore, he was not "an officer of the United States or a person acting for or on behalf of the United States in any official capacity" nor could he in the circumstances "ask * * * money * * * with intent to have his * * * action on any * * * matter which may at any time be pending, or which may by law be brought before him in his official capacity, or in his place of trust or profit, influenced thereby."

Appellant Cohen, then, could not have committed an offense against the United States under §207, Title 18 USCA, as charged herein, and neither he nor appellant Schnee could have conspired to commit such an offense. See United States v. Furer (DC Cal.), 47 Fed. Supp. 402, 405; United States v. Boyer (DC Mo.), 85 Fed. 425, 436; United States v. Gibson (DC Ill.), 47 Fed. 833, 834. In every case cited by the government to the contrary there was some semblance of authority, which is entirely missing here, for the act concerning which the bribe was asked or given.

Our conclusion herein is supported by the reasoning of a recent decision of the Supreme Court, Billings v. Truesdell, March 27, 1944, wherein the court differentiated carefully between the jurisdiction of civil and military authorities over those selected under the Selective Service Act.

Since the case must be reversed upon the points hereinabove treated, we do not treat of other points urged by the defendant as cause for reversal.

Reversed.

HEALY, C. J., Dissenting

I think the judgment should be affirmed.

There was abundant evidence that appellants Cohen and Schnee conspired to extract from Sartor a sum of money in return for the use of Cohen's influence in the procurement of an extension of Sartor's existing furlough. The record shows that the army would not grant an extension of the furlough except upon recommendation of Sartor's draft board, and that the board, in turn, would not have made a favorable recommendation in the matter had not Cohen officially advised it. The testimony is that during the progress of the conspiracy Cohen appeared at a board meeting and reported favorably on the extension Sartor was seeking. It is clear that the board relied upon Cohen's advice and followed it—not as the suggestion of an outsider but as the recommendation of an official who had a duty to perform.

It is the function of selective service boards to register and classify eligible men and to order them to report for induction into the army when needed, unless reason for

deferment exists. As stated by a witness, Colonel Merrill, "it is not consistent that the war department should nullify the action of the selective service system by unduly extending the deferment status of individuals selected for service." Hence, he said, it is the custom and practice of the army to call upon the draft boards to make investigations and recommendations in situations of the kind existing in this case. Colonel Merrill, whose current position was that of a liaison officer between the army and the selective service boards, testified not only to the practice, but said that if it were not followed "the effect would be to nullify the procedure of the selective service system in ordering a man in; so we make it a rule." I think the army was not without power to make the rule, nor the system without authority to respond to it.

The situation of the board and of the appeal agent in this instance is analogous to that of the special officers of the Indian service involved in United States v. Birdsall, 233 U. S. 223. These subordinate officers were accused of accepting bribes in return for recommendations of leniency in the cases of certain persons who had been convicted of the crime of selling liquor to Indians. The district court had held that the acts charged did not fall within the condemnation of §117 of the Criminal Code, giving the same reason as that assigned by the majority here, namely, that the officials had no duty to perform in the premises. In reversing the holding the Supreme Court observed that every action within the range of official duty comes within the purview of this statute. In order that the action of the accused person be official, said the court, "it was not necessary that it should be prescribed by statute; it was sufficient that it was governed by a

lawful requirement of the department under whose authority the officer was acting. [citing cases] Nor was it necessary that the requirement should be prescribed by a written rule or regulation. It might also be found in an established usage which constituted the common law of the department and fixed the duties of those engaged in its activities." The court said that if a judge desired recommendations of the Commissioner of Indian Affairs on the subject of leniency, the Commissioner was not lacking in authority to comply with the request. Said the court: "It is not enough to say that there is no mandatory requirement imposing the obligation to give the recommendation. In executing the powers of the Indian Office there is necessarily a wide range for administrative discretion and in determining the scope of official action regard must be had to the authority conferred; and this, as we have seen, embraces every action which may properly constitute an aid in the enforcement of the law."[1]

The observations are pertinent here. There can be no doubt that Cohen undertook to act and speak in his official capacity in his conference with the draft board on Sartor's case. The board, it was shown, usually relied upon the advice of its appeal agent on any matters out of the ordinary. To me it seems clear that the board itself was acting officially in the premises in line with the settled practice and custom obtaining in cases of this character. The status of the appeal agent was of a piece with that of the board. There is scant justi-

---

[1]For other authorities indicating an equally broad view of the range of official action under the statute consult Whitney v. United States, 99 F. 2d 327; Rembrandt v. United States, 281 Fed. 122; and Fall v. United States, 49 F. 2d 506.

fication for assuming the official status of the latter while rejecting that of the appeal agent. I take it that in any matter upon which the board itself may appropriately be asked to make a recommendation it is entitled to enlist the aid of the appeal agent, for under the regulation the latter is required "to investigate and report upon matters which are submitted for his investigation by the local board."

I think the majority holding exhibits too narrow and restricted a view of the obligation resting upon those entrusted with the administration of the selective service system. To Cohen was given the high assignment of safeguarding the interests of his youthful neighbors subjected to the call of their country in a time of war. His obligation faithfully to live up to his trust was as broad as the exigencies from time to time confronting the system of which he was a part.

(Endorsed:) Opinion and Dissenting Opinion. Filed May 19, 1944. Paul P. O'Brien, Clerk.

APPENDIX B.

Government Appeal Agents.

603.71 Appointment and duties. (a) For each local board, a government appeal agent shall be appointed by the President, upon recommendation of the Governor. The duties of the person so designated are: To appeal from any classification by a local board which, in his opinion, should be reviewed by the board of appeal; to care for the interests of ignorant registrants and their dependents with respect to appeals and, where the decision of the local board is against the interests of such persons and where it appears that such persons may not take appeals, due to their own nonculpable ignorance, to inform them of their rights and assist them to enter appeals to the board of appeal; and, after classification, to investigate and report upon matters which are submitted for his investigation by the local board. It shall also be the duty of such government appeal agent, where the interests of justice may require, to suggest to the local board a reopening of any case and to impart to the local board any information which in his opinion ought to be investigated. The government appeal agent should expedite the examination of the records of registrants as soon as they have been classified by the local board in order that appeals to the board of appeal, where found necessary, may be filed within the time limit specified in the regulations.

(b) An associate government appeal agent may be appointed for a local board by the President when the gov-

ernment appeal agent requests such assistance and, in the opinion of the Governor, the circumstances require it, and the Governor recommends the appointment. He shall perform such duties and shall have such powers and rights as are delegated to him by the government appeal agent. In the absence or inability of the government appeal agent to act, he shall perform the duties and shall have the powers and rights of the government appeal agent.

APPENDIX C.

A review of the Selective Service and Training Act of 1940 (Public Act No. 783, 76th Congress, approved September 16, 1940), discloses the following authority in the local draft board 199, mentioned in the indictment:

"Such local draft boards, under the rules and regulations prescribed by the President, shall have power within their respective jurisdiction to hear and determine, subject to the right of appeal to the appeal board herein authorized, all question or claims with respect to *inclusion for*, or *exemption or deferment from*, training and service under this Act, or all individuals within the jurisdiction of such local boards."

Administration System, Sec. 10, Para. 63,036.

Under Paragraph 63,515.12, Selective Service Regulations (Executive Order No. 8545, promulgated by the President, October 15, 1940), we find the following power expressly invested in the local draft boards.

"The jurisdiction of each local board shall extend to all persons registered in, or subject to registration in, the area for which it is appointed, and to all persons whose registration cards are duly transferred to it. It shall have full authority to do and perform all acts authorized by the selective service law. * * *."

Nowhere in the Selective Service and Training Act, or under the Selective Service Regulations is a local draft board invested with the official right, power or authority to so much as recommend to Army officials the period length of any furlough to be granted to a person already inducted into the armed forces of the government.

The indictment charges that one, Sartor, had already been inducted into the armed forces. It is apparent from a reading of the Act and regulations involved that the authority of the draft board relative to exemptions and/or deferments had expended itself and was inoperative.

"Induction is the process by which men selected for military service pass from the status of civilians to the status of members of the land and naval forces of the United States."

Selective Service Regulations, Para. 63,511.10.

It is certainly reasonable and logical to conclude that after a man has been inducted into the armed forces, his local civilian draft board, as to him, has no further official authority or power so long as the person inducted remains in the status of a member of the armed forces of this government.

"Selective service involves these processes: Registration, classification and selection, and delivery for induction. Registration is the process by which all males subject to registration under the selective service law are listed by name, and constitutes an inventory of man power for military purposes. Classification and selection is the process by which the relative availability of individual men for military service is determined, and those who are most available are selected. * * *."

Selective Service Regulations, Para. 63,511.10.

"An inducted man is a man who has become a member of the land and naval forces through the operation of the Selective Service System."

Selective Service Regulations, Executive Order 8574, promulgated by the President October 22, 1940.

It is plain from a review of the pertinent portions of the Act and Regulations here involved that the application of the said Sartor (already a member of the armed forces) to the local draft board for the board's approval of Sartor's request of his military superior officers to extend the period of his expiring furlough was not a matter that could be said, under the law, to be pending before the said draft board in its official capacity, because the draft board had no jurisdiction over the subject Sartor (already a member of the armed forces), nor did said local draft board have any jurisdiction over the subject matter, to wit, the request for an extended furlough from the United States Army.

The word "furlough" is defined in Webster's New International Dictionary, as follows:

"1. Leave of absence; esp. leave of absence given to a soldier to be absent for a certain time. In the United States Army furloughs are given only to cadets and enlisted men, officers being granted leave of absence. In the United States Navy a furlough is an extended leave of absence, or a suspension from duty by executive order, on half leave of absence pay, given only to an officer."

We will next consider the powers and duties of the office of government appeal agent, held by the Defendant Cohen under the Act and Regulations here involved, for the purpose of determining whether or not he had the official capacity, under the allegations of the indictment, to violate Section 207 of Title 18, U. S. C.

The Selective Service and Training Act of 1940 (Para. 63,036), provides that the President is authorized:

"(2) to create and establish a Selective Service System and shall provide for the classification of registrants and persons who volunteer for induction under this Act on the basis of availability for training and service, and shall establish within the Selective Service System *civilian local boards* and *agencies of appeal* as may be necessary to carry out the provisions of this Act.

"Appeal boards and Agencies of Appeal within the Selective Service System shall be composed of civilians who are citizens of the United States."

Selective Service and Training Act, Para. 63,036.

Under Paragraph 63,511.11 of the *Selective Service Regulations* (Executive Order No. 8545, October 15, 1940), it was officially declared:

"In general, the elements operate as follows: The election machinery, or other designated agencies, accomplishes the registration. The local board classifies the registrants, and has assigned to it a physician to make physical examinations, and a government appeal agent to protect the interest of the government and the registrants. An advisory board for registrants is appointed to advise and assist registrants in filling out questionnaires, making appeals, etc. * * *."

APPENDIX D.

[Testimony of H. J. Ross; Tr. of R. p. 271 *et seq.*]:

H. J. ROSS,

called as a witness by and on behalf of the defendants, being first duly sworn, testified as follows:

(This witness was examined prior to the cross-examination of Albert Charles Schnee, but for the sake of clarity the said Schee't testimony was set forth in continuity.)

Direct Examination

By Mr. Balter: [149]

I am an attorney at law. I have practiced in this city thirteen years. I am a member of the firm of Pacht, Pelton, Warne and Ross. Some time in the evening of March 6, 1943, I received a telephone call suggesting that I communicate with Room 40 of the City Hall of the police department and find out on what charge Mr. Schnee was being detained. I made inquiry as to whether Mr. Schnee was there. I made inquiry of Lieutenant King of the Los Angeles Police Department, or Captain Rieber from the Detective detail of the Los Angeles Police Department, of a number of men who had been pointed out to me by Lieutenant King as being members of the Federal Bureau of Investigation, and of anybody around the premises who I thought might be able to give me some information. There was no common response. From Lieutenant King I was informed that Mr. Schnee had been turned over to the members of the Federal Bureau of Investigation. From Captain Rieber I was given the same report, after he had talked with Lieutenant King. From the men who had been pointed out to me as being

members of the Federal Bureau of Investigation I was told that they never heard of the *men* and I knew nothing at all about him. Mr. Barr was there too. I had with me at that time in my pocket the draft card of Mr. Schnee. The purpose of my going there was to give the draft card to whoever wanted it. I spent until 2:00 a. m. of Sunday morning at the Police Department trying to find out if Mr. Schnee was there. I was never able to see Mr. Schnee that night, so the draft card remained with me until I left. I informed somebody at the Police Department that I had Mr. Schnee's draft card with me and the purpose of my having it with me. I informed the *man* who were pointed out to me as being members of the F. B. I. at the Police Department of the same thing. They told me they never heard of him. Then I called the F. B. I. headquarters in the Security Building at 5th and Spring Streets on the telephone. I called; I couldn't get into the building. I went to the building and I wasn't able to get into the elevator, so I just didn't make any further attempt. I reached [150] the F. B. I. by telephone on a number of occasions. I talked to a young l ly on the telephone and told her I was an attorney, that I had been advised Mr. Schnee was being held in the custody of the F. B. I. and I wanted to make some inquiry as to his purpose of being withheld and I wanted to see him. She told me to hold the phone a minute. A gentleman got on the phone. He told me he was the night man on duty, could he help me. And I again stated the purpose of my call and he said he didn't know anything about it. And I told him that I was sure there was such a person in their custody there and I insisted upon making some contact with him. That was the end of one conversation. I called later again. I talked to apparently

the same man that I had talked to before. And I said, "I am sure Mr. Schnee is there; that the information you gave me before is incorrect; and I am going to insist that you do something about it, because I think it is an outrage that a man can't get to talk to his attorney." And I then entered into certain arguments with him concerning what I intended to do, and to which he replied that he was sorry; the F. B. I. didn't want to do anything wrong, but he didn't know of Mr. Schnee. This effort to contact Mr. Schnee kept up until 2:00 in the morning. I was never able to contact Mr. Schnee or to surrender his draft card to anyone requiring it.

Cross-Examination

By Mr. Bledsoe:

I was told by Mr. Schnee's wife that it might be something to do with the Selective Service and that his card was in his wallet at home. I talked to somebody at the police station. At first I asked the F. B. I. men if they had Mr. Schnee. I asked them what the investigation was about. They said they never heard of Mr. Schnee. They didn't say anything about an investigation and I thought of several. I asked them what the trouble was. They didn't tell me anything. They did not say there was no trouble. They said they didn't know who Mr. Schnee was.

Q. You wouldn't have any objection to having Mr. Schnee give [151] a complete statement to the F. B. I. that he wasn't guilty, would you?

Mr. Balter: Just a minute.

The Court: Just a minute. That is an improper question.

(Witness continuing)

On that occasion I was Mr. Schnee's attorney. I appeared on his behalf on the occasion when he was arrested on this charge.

Q. Did you give him any instructions whether or not to make a statement?

Mr. Balter: That is not cross-examination, your Honor.

The Court: It is improper. Objection sustained. It is also a communication between attorney and his client.

(Witness continuing)

I went in the building where the F. B. I. office is. I didn't get up to the F. B. I. office. I think I asked to go up to the F. B. I. office. The elevator man told me I couldn't go up there. I did not ask him whether it was open 24 hours a day or whether it was closed. Then I left. I got his draft card from his wife. I obtained Mr. Schnee's release about 7:00 the next night, after considerable discussion with the United States Commissioner.

Q. Do you recognize any of the F. B. I. agents that you talked to that night at the City Hall?

A. Do I recognize them here?

Q. Yes. Do you see any of them here?

A. The gentleman back of you, I know I have seen him on another occasion.

Mr. Bledsoe: Stand up.

(Mr. Richardson stands as requested.)

The Court: Who is this man?

Mr. Bledsoe: Mr. Richardson.

A. I don't recall whether I saw him that night or not. I saw him in court the next day and I know he was—

The Court: That is all, Mr. Richardson. [152]

A. —a member of the Federal Bureau of Investigation. I saw some of the others, but I don't recognize any of them being present in court here.

Q. By Mr. Bledsoe: That night at the City Hall?

A. That is correct.

(Witness continuing)

Lieutenant King told me they were F. B. I. agents. I asked them if they were from the F. B. I. They made no reply. When I asked my question and they said they knew nothing about it, Lieutenant King looked at me and nodded his head this way (indicating). They had told me they knew nothing about it. I look at him and he nodded his head this way (indicating). To me it had a certain significance and I accepted it as such. Lieutenant King told me that he couldn't help me; that he couldn't give me the information I was requesting. I asked him to tell me whether or not Mr. Schnee was there. He said "I turned him over to the F. B. I. and they have got him." I didn't know where they had him. Lieutenant King said he was turned over there at the police station.

(The witness also identified Mr. Wells as a Federal Bureau of Investigation agent who was present at the City Hall that night.)

[Testimony of Albert Charles Schnee, Tr. of R. p. 253 *et seq.*]:

"They put me in a car, and we started to drive toward town. We drove about a half a block away from there, and I said to them, 'Gentlemen, I left my wallet at home, and it just came to me that my draft card is in there,' and I says, 'If it won't be causing you too much trouble I would like to go home and get it.' One of the police officers says, 'How old are you?' I says, 'I am 44.' He says, 'You don't have to worry about your draft card. It is the young fellows they are looking for.'"

". . . Mr. Richardson went out. Then he came back and said, 'Are you Mr. Schnee?' I says, 'Yes, sir.' He says, 'I'm Richardson from the Federal Bureau of Investigation' and showed me his credentials. He says, 'I want to talk to you in a few minutes.' I said, 'Mr. Richardson, would you allow me to call my home?' I was afraid to mention my attorney, because everybody turned me down. I asked the police lieutenant, and I asked Donovan, and they both turned me down. Mr. Richardson said, 'No, I have no objection.' He said, 'What do you want to call her for?' I said, 'I just want to call her and let her know where I am at.' He says, 'I have no objection.' Mr. Richardson let me call my home. Mr. Donovan was on an extension phone listening to the conversation. I said to my wife, 'I am in Room 40.' I knew that my nephew was having dinner at my home that night. We were expecting some guests, and I says, 'Will you have my nephew bring down my wallet. I left

it in the drawer with my car keys, because I have my draft card there, and I think I should have it.' My wife said, 'Yes, I will send them down right away.' "

Finally Mr. Wells said to me, "Do you want to sign a statement that you got this money from this man?" I says, "No." "Why not?" "That statement isn't true." "All right, don't do it." Then he says, "I am going to lock you up," and the way I felt then I did not care what he did to me. I said to him, "Why, you have no charge placed against me. I don't know why you are going to lock me up." He says, "Have you got your draft card with you?" I says, "Look, you were at the police station. You know I called to get my draft card, and I am sure my nephew is there with my draft card. You were pushing me from one room to another, to avoid his giving me my draft card, and now you ask me if I haven't got my draft card." I says, "You know I haven't got my draft card." He says, "Then that is what we are going to lock you up about." I says, "You are the boss. I haven't anything to say." They locked me up that morning about 3:00. I knew that I was booked on a charge that I did not have a draft card. That was before the United States Commissioner on Monday. The case was put over by Mr. Bledsoe in order to check the Draft Board to see whether my cards were in order. I had my car there, which they examined, and it was put over I think until Friday, but they dismissed it on Tuesday. I was actually released from the County Jail on bond Sunday about 7:30 at night. In other words, I stayed in jail from 3:00 in the morning until 7:30 at night on the draft card charge. I was arrested again Monday night. At that time I was arrested on the charge involved in this case.

[Testimony of Harry M. Popkin, Tr. of R. p. 160]:

Q. Did you see Joe Ross down at the auto theft detail?

A. I think I saw somebody. Who is Ross?

Q. An attorney who came down there looking for Mr. Schnee.

A. I think I did.

(Witness continuing)

I saw another gentleman down there looking for Mr. Schnee. I don't know his name. A young man. I don't know how long they were around there, but I imagine they were around there an hour or so. I think Mr. Schnee had been taken down to the F. B. I. At least he was taken out of the auto detail. I don't know just where they took him. They took him out of the auto theft detail office. These people were inquiring for Mr. Schnee. I don't recall what they were told. I think the gentleman in charge of the auto detail talked to him. I think he said he didn't know just where they were.

APPENDIX E.

[Testimony of David A. MacCulloch, Tr. of R. p. 161 *et seq.*]:

DAVID A. MacCULLOCH,

called as a witness by and on behalf of the Government, being first duly sworn, testified as follows:

Direct Examination

By Mr. Bledsoe:

I am a special agent of the Federal Bureau of Investigation. I was such on March 7, 1943. I did not arrest defendant Schnee on March 6th. He wasn't arrested. He merely accompanied myself and Agent Richardson to the office, at 5th and Spring. I had a conversation with Mr. Schnee.

Q. By Mr. Bledsoe: What did Mr. Schnee say?

Mr. Balter: I object to that, may it please the Court, on the ground that, as we stated yesterday, a conversation between the defendant and any witness after the commission of the transaction is not relevant or material. [75]

The Court: Objection overruled. Exception allowed.

Mr. Cantillon: We will object on behalf of defendant Cohen, on the first ground that it is immaterial; on the second ground, hearsay; on the third ground, no foundation laid.

The Court: So understood. Exception allowed.

Mr. Cantillon: And on the fourth ground, that it is a declaration of an alleged co-conspirator made after the time the conspiracy was terminated.

The Court: Exception will be allowed to the defendant.

(Witness continuing)

First when he was questioned regarding the events of the day of March 6th, the only statement he made was, "I don't know what it is all about. The only thing I can think of, it must have something to do with a car theft." He said, "I was taken to the Auto Theft detail, and this is the only thing I can imagine that is connected with, is the theft of a car." Other than that he stated he knew nothing whatever why he was picked up by the police officer or, in fact, didn't know a thing about the whole transaction during the day.

I asked him if he called Mr. Popkin. He told me that he did. He told me that he called him once around 12 or 1 o'clock. He said he called for Leo Popkin, to buy him some Bafflin cigars, and that he called the theatre; the girl answered the phone and told him, "Mr. Leo Popkin will be out until 3:00 o'clock." And he said, "Thanks" and hung up. And he stated that that was the entire extent of his conversation. I asked him if he had talked to Harry Popkin on the telephone that day. He stated that around 4 o'clock he was given a note with a number on it by, I believe it was the chief at the Fox Studios, who told him he should call that number immediately; that it was very important; and Mr. Schnee stated that he didn't know the place to which this number ran, but that it was different from the number he had called in the morning when he asked for Leo Popkin; [76] that he called this number and had a conversation with Harry Popkin. Mr. Schnee stated that he had known Harry Popkin over a period of some eight years casually, that he had seen him at social events, fights and things of that nature. He stated that he wasn't sure that he could tell Harry Popkin's voice over the phone and that he wasn't

certain how he knew it was Harry Popkin he was talking to, since Harry Popkin got—blew up, so to speak; but he was certain he was talking to Harry Popkin. I asked him if he knew Mr. Cohen. He said that he did. I believe he said for a period of a couple of years. I asked him if he had seen Mr. Cohen that morning or had any conversation with him. He said that he had seen him that morning around 11 o'clock and that Mr. Cohen had seen him at the studio regarding his income tax. Mr. Schnee's income tax. I asked Mr. Schnee if he would care to sign a statement. He stated that he didn't care to unless advised to do so by this attorney. That is the gist of the conversation I had with him.

Cross-Examination

By Mr. Balter:

I never permitted him to call his attorney: Nor did I charge him with any crime at that time before I had this conversation with him. He wasn't held under any charge. He wasn't released. He wasn't held. He was staying there of his own volition up to the time that we decided to book him, which was around 1 o'clock in the morning. I was there with him the greater percentage of the time. Other agents came in and went out. I was there all the time. I believe there were possibly three other agents there. There were no police officers that I saw in our office. I don't recall that he requested to communicate with his family. We didn't file any charges at that time. I wrote the statements down that he made to me and asked if he wished to sign them, and he said he didn't, unless advised to by his attorney. It is a fact that the crime he was charged with was for not carrying a draft card, and I [77] believe that was dismissed before the commis-

sioner the next day. I wouldn't call this charge a subterfuge for holding Mr. Schnee. I would call it that he was charged with a violation of the Selective Service Act of failing to have a draft card. I do not know whether his nephew was down there with his draft card in his pocket.

Cross-Examination

By Mr. Cantillon:

Mr. Schnee accompanied Mr. Richardson and myself to the bureau office; he was placed in one of the rooms there and I talked to him. We left the City Hall through the window.

The Court: Mr. McCullough, do I understand if you have a man under investigation and talk to him and he asks to call his attorney, that you don't permit him to do it, or didn't in this case?

A. I frankly don't recall him requesting to call his attorney. I can't say for sure. I know he didn't call.

The Court: I am quite surprised that a citizen charged with anything wouldn't be permitted to call his attorney if he wanted to.

A. At that time he wasn't charged with anything. We were merely trying to obtain from him the facts of the case, and in accordance with that he told us he was attempting to give us the facts of the case.

By Mr. Balter:

(Witness continuing)

It is my knowledge it is not a fact that Mr. Joseph Ross, Attorney at Law, phoned while I was there and asked to see Mr. Schnee, and I didn't let him up there. To my knowledge he didn't. He may have. I didn't talk

to Mr. Ross and I personally don't know. I don't know who answered the phone when Mr. Ross called. There is always an agent on night duty. There is a girl on the switchboard. There are agents which are assigned to the reception room. Any [78] one of them might have taken it. I can't say for sure who the agent was who might have answered the phone that night. It might have been the agent that was on night duty. Mr. Wells was there and Mr. Richardson was there. It is possible that the call may have come in to either Wells or Richardson, I don't know.

Mr. Balter: If the court please, I would like to make a motion on behalf of the defendant Schnee that all the testimony of this witness regarding a conversation with the defendant Schnee be stricken and the jury be instructed to disregard it, on the ground that the defendant was not permitted his constitutional rights of talking to his attorney and that the statement was taken from him before any charge was filed against him relating to the case.

The Court: Motion denied.

Mr. Balter: Exception.